UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATALIA KUROVSKAYA, individually and on behalf of all other persons similarly situated, Plaintiffs, -against- PROJECT O.H.R., INC., Defendant.	SDNY Index No. 16-cv-03030 (LAK) New York County Supreme Index No. 150480/2016

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO REMAND

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PRELIMINARY STATEMENT

This action was brought on behalf of Named Plaintiffs Natalya Kurovskaya and Ruslan Domnich and a putative class of home health care workers, home attendants and/or employees (collectively "Plaintiffs") who provided personal care, assistance, health-related tasks and other home care services to clients of Defendant Project O.H.R., Inc. (hereinafter "Project O.H.R." or "Defendant"). Plaintiffs seek to recover wages and benefits which Plaintiffs were statutorily and contractually entitled to receive pursuant to New York Labor Law § 190 *et seq.*, New York Labor Law § 663, New York Labor Law § 651 *et seq.*, New York Labor Law § 650 *et seq.*, 12 New York Codes, Rules, and Regulations (hereinafter referred to as "NYCRR") §§ 142-2.1, 142-2.2, 142-2.4, 142-2.14 and 142-2.6, and New York Public Health Law § 3614-c.

Plaintiffs submit this memorandum of law in support of their motion to remand this action to the New York Supreme Court of the State of New York. As set forth below, Defendant has failed to meet its burden to establish jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 29 U.S.C. §1332(d), by a "reasonable probability." *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 59 (2d Cir. 2006). Even assuming that Defendant could satisfy its burden under CAFA, remand is warranted under numerous CAFA exceptions. As such, Plaintiffs' motion to remand the action to the New York Supreme Court of the State of New York, where it was initially filed, should be granted.

PROCEDURAL HISTORY

Plaintiffs filed their action against Defendant in the Supreme Court of the State of New York, County of New York, on January 20, 2016. [*See* Ex. A, annexed to Declaration of LaDonna M. Lusher ("Lusher Decl.").] On March 28, 2016, Plaintiffs filed an amended complaint. [*See* Ex. B, annexed to the Lusher Decl.] On April 25, 2016, Defendant filed its Notice of Removal, removing this action to the United States District Court for the Southern District of New York, on the sole basis that this Court has original subject matter jurisdiction pursuant to CAFA.

ARGUMENT

I. CAFA DOES NOT CONFER SUBJECT MATTER JURISDICTION

Under CAFA, a district court is vested with original jurisdiction of any class action where the amount in controversy exceeds $5,000,000, exclusive of interests and costs, and where there is minimal diversity (i.e. where at least one plaintiff and one defendant are citizens of different states). *See* 28 U.S.C. §1332(d)(2). It is Defendants' burden to prove that CAFA applies and therefore that removal is proper. "Under CAFA, as under the traditional rule, the party asserting subject matter jurisdiction has the burden of proving it. To satisfy its burden, defendant must prove [CAFA's requirements] to a reasonable probability…" *Blockbuster*, 472 F.3d at 59; *see also Sorrentino v. ASN Roosevelt Center Center, LLC*, 588 F. Supp. 2d 350, 354 (E.D.N.Y. 2008) (To establish jurisdiction under CAFA, the movant is required to come forth with "competent proof" to support facts "by a preponderance of the evidence.") (internal citations omitted).

Defendant cannot establish that the minimal diversity requirement is satisfied. This is not a case where one party is clearly a citizen of another state. Rather, Defendant's sole argument is based on a pleading technicality. Defendant argues that Plaintiffs failed to specifically plead that they and the class were New York *citizens*, arguing that Plaintiffs merely alleged they *resided* in New York. [Notice of Removal ¶ 16.] Plaintiffs cannot be penalized for failing to make specific allegations in their Amended Complaint that would not be necessary under New York State's more liberal pleading requirements. *See Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1020 (9th Cir. 2011). ("[D]ifferent pleading requirements in state and federal court" can create "difficulties" for plaintiffs whose complaint is subject to scrutiny under a higher standard after removal to federal court under CAFA.)

If considered necessary by this Court, Plaintiffs would amend their complaint to clearly state that they and members of the putative class are all citizens of New York. Amendments are permitted after removal so that plaintiffs may address or clarify issues relevant to CAFA. *See e.g. Benko v. Quality Loan Serv. Corp*., 789 F.3d 1111, 1117 (9th Cir. 2015) ("plaintiffs should be permitted to amend a complaint after removal to clarify issues pertaining to federal jurisdiction under CAFA.") (*citing Id*. (permitting amendment to complaint after removal and analyzing remand under CAFA's exceptions based on amended pleadings)); *Hart v. Rick's NY Cabaret Int'l, Inc.*, 967 F. Supp. 2d 955 (S.D.N.Y. 2014) (on motion to remand, analyzing subject matter jurisdiction under CAFA based on allegations in third amended complaint); *Superior Partners v. Chang*, 471 F. Supp. 2d 750, 756 (S.D. Tex. 2007) (permitting plaintiffs to amend their complaint to narrow the scope of one cause of action and subsequently remanding under CAFA exceptions); *Dent v. Renaissance Mktg. Corp.*, No. 14 C 02999, 2015 U.S. Dist. LEXIS 70248, at *2 (N.D. Ill. June 1, 2015) (remanding action based on amended pleadings submitted after CAFA removal); *Aana v. Pioneer Hi-Bred Int'l, Inc.*, No. 12-00231 LEK-BMK, 2013 U.S. Dist. LEXIS 59959, at *32 (D. Haw. Apr. 26, 2013) (analyzing subject matter jurisdiction under CAFA based on plaintiffs' second amended complaint filed after removal); *Lancaster v. Daymar Colls. Grp., LLC*, No. 3:11-CV-157, 2012 U.S. Dist. LEXIS 19946, at *5 (W.D. Ky. Feb. 14, 2012) (plaintiffs able to amend their complaint before court determined applicability of CAFA); *Gavron v. Weather Shield Mfg.*, No. 10-22088-CIV, 2010 U.S. Dist. LEXIS 108559, at *4 n.2 (S.D. Fla. Sep. 29, 2010) (granting plaintiff an opportunity to amend complaint before analyzing whether CAFA applied).

If necessary, Plaintiffs will amend their complaint to clarify that they and members of the putative class are New York citizens. CAFA jurisdiction therefore cannot apply because there is no minimal diversity. Remand back to New York State Court would thus be mandatory.

II. EVEN IF CAFA DID APPLY, THE ACTION SHOULD BE REMANDED UNDER CAFA'S EXCEPTIONS

Assuming, *in arguendo*, Defendant could somehow satisfy CAFA's requirements, the action must still be remanded under CAFA's exceptions. These exceptions to CAFA were "designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to the state." *Sorrentino*, 588 F. Supp. 2d at 355 (internal citations omitted).

A. THE "LOCAL CONTROVERSY" EXCEPTION APPLIES

This action falls under the "local controversy" exception, requiring remand. Under this exception, the district court "shall decline to exercise jurisdiction"

(i) Over a class action in which—

> (I) greater than two-thirds of the members of the putative class are citizens of the state in which the action was originally filed;
> (II) at least one defendant from whom "significant relief" is sought is a citizen of the State in which the action was originally filed;
> (III) the principal injuries resulting from the alleged conduct were incurred in the state in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

See 28 U.S.C. § 1332(d)(4)(A); *Sorrentino*, 588 F. Supp.2d at 355.

First, it can be inferred that two-thirds of the members of the putative class are citizens of New York State. Citizenship is determined by domicile, which reflects "the place where a person has a true fixed home and principal establishment" and where "he has the intention of returning." *Richins v. Hofstra University*, 908 F. Supp. 2d 358, 361 (E.D.N.Y. 2012) (internal citation omitted). When seeking to establish the two-thirds threshold, courts in this Circuit have held that a party must show that it is "reasonably likely" that two-thirds of the proposed class are citizens of the state at issue. *See Mattera v. Clear Channel Communs., Inc.*, 239 F.R.D. 70, 80 (S.D.N.Y. 2006). When determining citizenship for CAFA's exceptions, Courts may "simply make reasonable assumptions about the makeup of the putative class." *Commisso v. Price Waterhouse Coopers LLP*, No. 11 Civ. 5713 (NRB), 2012 U.S. Dist. LEXIS 105151 (S.D.N.Y. July 27, 2012) (*citing Mattera*, 239 F.R.D. at 80-81 (court assumed citizenship requirement was met because putative class members all worked in New York); *Lucker v. Bayside Cemetery*, 262 F.R.D. 185, 189 (E.D.N.Y. 2009) (court remanded based on "the eminently reasonable assumption" that the majority of people desiring to be buried in a Queens cemetery were New York State residents); *Weider v. Verizon N.Y., Inc.*, No. 14-CV-7378 (FB) (JO), 2015 U.S. Dist. LEXIS 70912, at *4 (E.D.N.Y. June 2, 2015) (court assumed citizenship requirement was met because employer was a citizen of New York and class members performed work solely for New York accounts).

In *Commisso*, the court held it would be "reasonable to assume" that a significant portion of the putative class members were New York citizens because the class was limited to individuals employed in the New York office. *Commisso*, 2012 U.S. Dist. LEXIS 105151 at *19. Similarly, Plaintiffs have filed this action on behalf of a class of individuals who worked for Defendant, a New York company, providing services to Defendant's clients exclusively in the state of New York. It is therefore reasonable to assume that more than two-thirds of the putative class are citizens of New York.

Plaintiffs can also satisfy the remaining factors of the "local controversy" exception. Defendant is incorporated in New York and is therefore a citizen of New York. *See* 28 U.S.C. § 1332(c) (A corporation "shall be deemed a citizen of any State by which is has been incorporated….") Moreover, the injuries suffered by Plaintiffs and the putative class took place in New York as this action seeks payment of wages and overtime to Defendant's employees for work they performed in New York for Defendant's clients. Plaintiffs are also unaware of any other class action against Defendants, filed within the past three years from the date of Plaintiffs' initial class action complaint, alleging the same claims on behalf of the same putative class.

In light of the above, the "local controversy" exception is satisfied. Remand to the New York State Supreme Court, where this action was originally filed, is therefore mandatory.

B. THE "HOME STATE" CONTROVERSY EXCEPTION APPLIES

Remand is also mandatory pursuant to CAFA's "home state controversy" exception, which states that a district could shall decline to exercise jurisdiction over a class action where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B); *see also Gold v. N. Y. Life Ins. Co.*, No. 09 Civ. 3210 (WHP), 2012 U.S. Dist. LEXIS 67211 (S.D.N.Y. May 14, 2012) (remanding action under home state exception).

As discussed previously, it is reasonably likely that more than two-thirds of the proposed class members are citizens of New York. Additionally, as there is only one Defendant, it must be the primary defendant. Plaintiffs have thus also met the "home state controversy" exception to CAFA jurisdiction.

C. THE "INTEREST OF JUSTICE" EXCEPTION APPLIES

Remand is also proper under the "Interest of Justice" exception, which states that:

> A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on considerations of—
>
> (A) whether the claims asserted involve matters of national or interstate interest;
> (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
> (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
> (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
> (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 U.S.C. § 1332(d)(3).

In the event this Court finds it cannot reasonably assume that two-thirds of the putative class are citizens of New York, it is certainly reasonable to assume that at least one-third of the class are New York citizens given that they all worked for Defendant exclusively in New York, providing services solely to New York residents. The ties that bind Plaintiffs to New York are therefore substantial. Further, as set forth previously, Defendant is the only defendant, and therefore the "primary" defendant, and is a New York citizen.

The enumerated factors to be considered by the Court weigh heavily in favor of remand. This action is purely local in nature. New York has a great interest in adjudicating this lawsuit because a large percentage of the putative class are citizens of New York State. Defendant employed members of the putative class to provide services to clients solely within the State of

New York. There can be no dispute that the alleged injuries sustained by Plaintiffs and members of the putative class were incurred in the State of New York. Plaintiffs are unaware of any other class action asserting similar claims that have been filed within the three year period prior to the filing of Plaintiffs' initial complaint.

Further, Plaintiffs' claims arise exclusively under New York law, including for spread of hours wages, failure to pay wages, and breach of contract under NY Public Health Law, none of which have similar federal counterparts. Indeed, federal law did not even provide relief for Plaintiffs to receive overtime until recently. *See* 2015 amendment to Fair Labor Standards Act, 29 U.S.C. § 206 *et seq*. Plaintiffs' claims under the NY Public Health Law demand wages for work performed where Defendant entered into agreements for payment from New York governmental agencies for services provided. See NY CLS Pub Health § 3614-c(2) ("[N]o payments by government agencies shall be made to certified ***home health*** agencies, long term ***home health*** care programs or managed care plans for any episode of care furnished, in whole or in part, by any home care aide who is compensated at amounts less than the applicable minimum rate….").

Claims under the NYLL do not "apply to people who work outside of the State of New York." *Magnuson v. Newman*, 2013 U.S. Dist. LEXIS 138595, at *16-17 (S.D.N.Y. Sep. 25, 2013) (*citing Kassman v. KPMG LLP*, 925 F. Supp. 2d. 453, 469 (S.D.N.Y. 2013)). "Article 19 of the NYLL, which includes the minimum wage, overtime, and spread of hours provisions…, begins with a 'Statement of Public Policy' section stating that it was enacted to address the fact that '[t]here are persons employed in some occupations *in the state of New York* at wages insufficient to provide adequate maintenance for themselves and their families.'" *Magnuson v. Newman*, 2013 U.S. Dist. LEXIS 138595, at *16-17 (S.D.N.Y. Sep. 25, 2013) (*quoting* N.Y. Lab. Law § 650 (McKinney) (emphasis in original).

As nicely summarized by the court in *Lucker v. Bayside Cemetery,* 262 F.R.D. 185, 190 (E.D.N.Y. 2009):

> This is a case with New York defendants who entered into New York contracts…Furthermore, all of plaintiffs' allegations have been brought pursuant to New York law. This is not the type of class action with national implications contemplated by CAFA, and is precisely the kind of local lawsuit over which Congress explicitly instructed district courts to decline jurisdiction.

For the reasons set forth above, the "interests of justice" exception also applies, warranting remand.

D. LIMITED DISCOVERY

In the unlikely event this Court does not believe it can reasonably assume at least one-third or two-third of the class consist of New York citizens, Plaintiffs respectfully request limited expedited discovery on the issue of class citizenship prior to any ruling with respect to CAFA's exceptions. *See Abdale v. N. Shore-Long Island Jewish Health Sys.*, No. 13-CV-1238(JS)(WDW), 2014 U.S. Dist. LEXIS 88881, at *31-32 (E.D.N.Y. June 30, 2014) (ordering "expedited discovery on the issue of class citizenship" before ruling on CAFA exceptions because "much of the information regarding the putative class is possessed by Defendants" (*citing Barricks v. Barnes-Jewish Hosp.*, No. 11-CV-1386, 2012 U.S. Dist. LEXIS 51422, 2012 WL 1230750, at *2 (E.D. Mo. Apr. 12, 2012) (ordering discovery before considering applicability of local controversy exception)); *see also Reid v. Primerica Financial Services Agency of New York, Inc.*, 14-cv-07796-ALC (S.D.N.Y. Sept. 28, 2015) (Carter, J) (Docket No. 34) ("In order for the Court to assess jurisdiction under the Class Action Fairness Act…limited discovery is needed.")

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request this Court grant Plaintiffs' motion to remand this action in its entirety back to the Supreme Court of the State of New York.

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May 25th, 2016

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